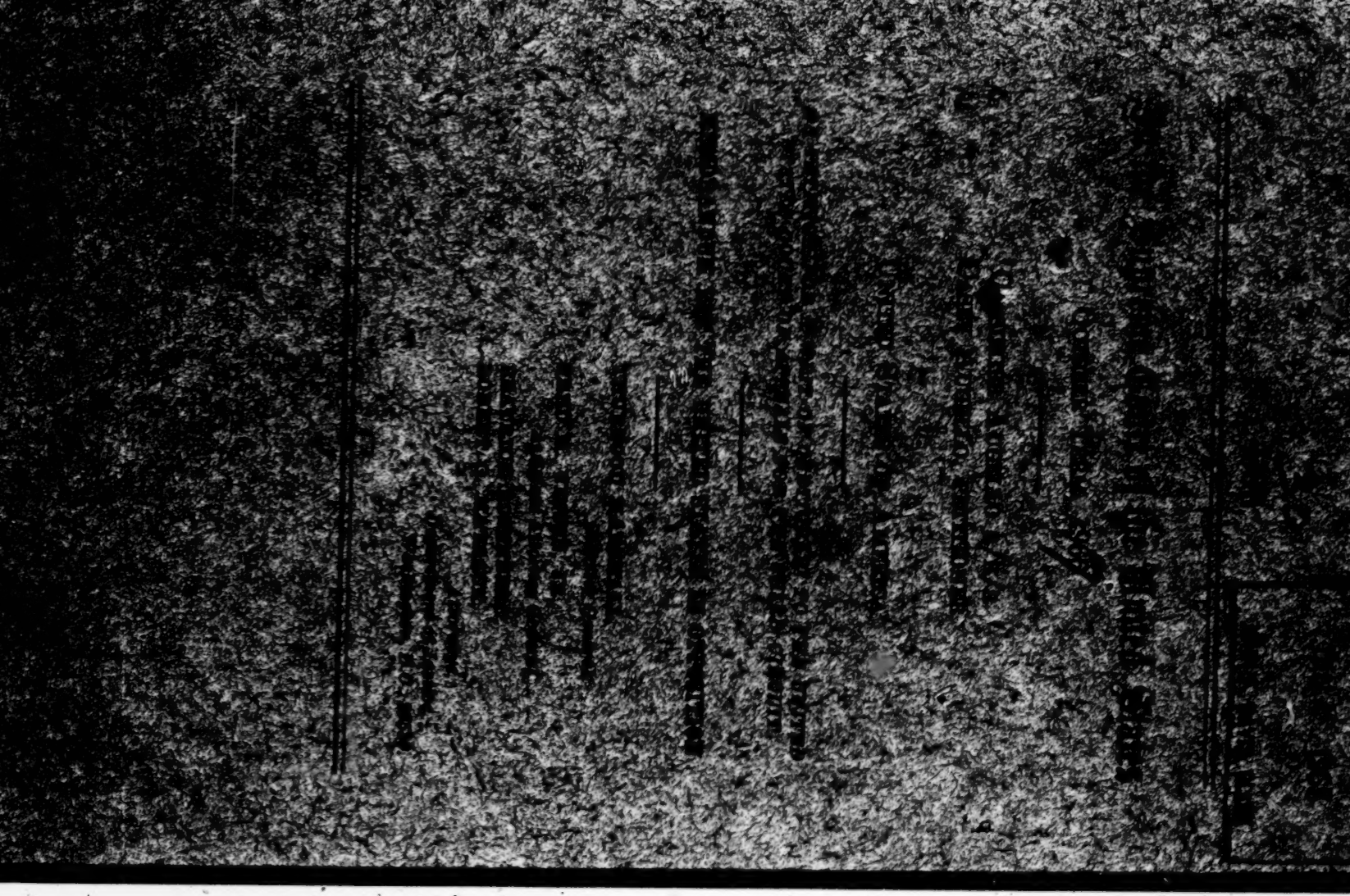

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 835

CASSIMIRE AUGELLO a/k/a
CASEY AUGELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After waiving trial by jury, petitioner was convicted in the United States District Court for the District of New Jersey of failing to pay the special tax on wagering operations in violation of 26 U.S.C. 7262 (R. 2a, 177a). He was sentenced to pay a fine of $3,000 (R. 2a, 179a). On appeal the conviction was affirmed (Pet. App. 7–10).

The sole issue raised is the validity of the execution of arrest and search warrants.[1] Evidence ob-

[1] The constitutionality of the statute, an issue before this Court in *Costello* v. *United States*, No. 41, this Term, was not raised below and is not raised here.

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tained thereby was challenged by a pre-trial motion to suppress, which was denied by the district court (R. 104a). The facts may be briefly summarized:

On June 11, 1964, at about 2:30 p.m., agents went to petitioner's premises to execute the search and arrest warrants (R. 70a, 95a). Through the front screen door (the permanent front door being open) the agents saw petitioner's sister and mother in the living room (R. 70–71a, 109a). Agent Sullivan rapped on the door and said, "Federal Officers with a search warrant, open the door." Petitioner's sister thereupon yelled, "Casey! Casey!" and started toward the rear of the house. Agent Drutz discovered that the screen door was locked, and supervising agent Cairone told him to break it. Drutz put the heel of his hand through the screen, reached in and lifted the latch. The three agents then entered (R. 71a, 83a, 109a).[2] The time between the arrival at the door and the entry was no more than five seconds (R. 75a).

Petitioner was arrested in a back room (R. 110a, 144a). In a search of the premises pursuant to the search warrant, the agents seized an adding machine, rundown sheets for horse bets, racing forms and $8,578 in cash. Most of the items introduced in evidence were taken from petitioner's bedroom, which

[2] Defense witnesses testified that the agents made no announcement regarding the purpose of their entry, that the permanent door behind the screen door was closed, and that the agents broke through this door (R. 15a, 29a–30a, 34a, 38a–39a, 48a, 60a). The district judge's findings demonstrate that the judge did not credit the defense testimony (R. 152a).

was near the kitchen (R. 111a–114a, 124a–130a, 7a–8a).

The evidence was sufficient to show that the agents had been "refused admittance," and they were, therefore, justified under 18 U.S.C. 3109 in breaking the screen door to effectuate entry.[2] *McClure* v. *United States,* 332 F. 2d 19 (C.A. 9), certiorari denied, 380 U.S. 945; *Masiello* v. *United States,* 317 F. 2d 121, 122–123 (C.A.D.C.); *United States* v. *Whiting,* 311 F. 2d 191, 194–195 (C.A. 4), certiorari denied, 372 U.S. 935. The women in the house did not indicate that they intended to admit the agents; instead they rushed away from the door and petitioner's sister shouted to him. Her warning may have been calculated to give him time to destroy incriminating evidence, and the agents were justified in taking immediate action.

Petitioner argues that the reasoning of the *McClure* case, *supra,* which involved narcotics, should not be applied to wagering-tax violations. However, the danger that instrumentalities of crime (*e.g.,* gambling paraphernalia and adding machine tapes) will be destroyed is as great in gambling as in narcotics cases. *E.g., DeCesare* v. *United States,* 356 F. 2d 107, 108 (C.A. 5) (incriminating evidence burned in gambling tax case); *Masiello* v. *United States,* 317 F.

[2] 18 U.S.C. 3109 provides: "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of a warrant."

2d 121, 122 (C.A.D.C.) (numbers slips on "flash paper" burned). The trial court noted that "it takes only seconds to flush sheets of paper down a hopper where they are lost; it only takes seconds to put a match to highly inflammable paper, and then it is lost; it only takes seconds to wet certain types of paper with our new modern and scientific products to have all the writings disappear therefrom, and as evidence they are lost" (R. 103a).

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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